

AFTERWORD

THREE RING CIRCUS REVISITED: THE DRIFT BACK TO LOCHNER CONTINUES

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In a recent issue of the *Stetson Law Review*,¹ I compared constitutional limitations on content-neutral time, place, and manner restrictions on political speech with restrictions on commercial speech,² and came to the conclusion that the tests were virtually the same.³ In the main the tests basically⁴ required that the government's purpose for either type of regulation be a substantial one and that the means selected be narrowly tailored⁵ to that purpose.⁶ The Article then

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1. Marks, *Three Ring Circus: The Supreme Court Balances Interests*, 18 *STETSON L. REV.* 301 (1989).

2. *Id.* at 347-51.

3. *Id.* at 349. Indeed, the Court itself has stated that the commercial speech test was "substantially similar" to the application of the test for validity of time, place, and manner restrictions upon protected speech." *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3033 (1989) (quoting *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987)).

4. In addition to the parts of the tests that are discussed below, a content-neutral time, place, and manner limitation must "leave open ample alternative channels of communication." See Marks, *supra* note 1, at 348 (citing *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)). The additional elements of the commercial speech test are that the speech must not mislead the listener nor concern an illegal activity and it must directly advance the achievement of the regulation's purpose. See *id.* at 349 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980)).

5. The customary language for content-neutral time, place, and manner restrictions was "narrowly tailored," while the language for commercial speech was "as well served by a more limited restriction." See *infra* note 6.

6. "The State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, [and] are narrowly tailored to serve a significant government interest," See Marks, *supra* note 1, at 347-48 (quoting *Perry*, 460 U.S. at 45). "The State must assert a substantial interest to be achieved by restrictions on commercial speech Second, if the government interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.* at 349-50 (quoting *Central Hudson*, 447 U.S. at 564).

equated the idea of narrowly tailored means⁷ to the concept of necessary means in the compelling governmental interest test.⁸ By implication, the Article concluded that narrowly tailored means was the same idea found in necessary means; that the regulation would be declared unconstitutional if it could reasonably be achieved by a means that had a less drastic impact on speech.⁹ Thus, it seemed that the only real difference between constitutional limits on content-based regulation¹⁰ and content-neutral time, place, and manner and commercial speech regulations was the gravity of the requisite government purpose: "compelling" as opposed to "substantial."

The Supreme Court in two subsequent decisions, *Ward v. Rock Against Racism*¹¹ and *Board of Trustees v. Fox*,¹² decided that the no-less-drastic-means test does not now and never has been included in the content-neutral time, place, and manner and commercial speech tests. Rather, the concept of narrowly tailored must be viewed as something akin to means that are reasonable under the circumstances.¹³ The Court has thus done two things: 1) denied the existence of that which had apparently been true in the past, and 2) reduced the first amendment protection provided in the content-neutral time, place, and manner and commercial speech areas. This

7. "[T]he words of the test for content-neutral time, place, and manner regulation of political speech in the public forum and for obviously content specific regulation of commercial expression are identical: important or substantial purpose and necessity of means." *Id.* at 350.

8. This test requires the government to show that the "regulation is necessary to serve a compelling state interest." *Id.* at 333 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1980) (quoting *Perry*, 460 U.S. at 45)).

9. For example, Justice O'Connor in *Boos v. Barry*, 485 U.S. at 321, concluded that for means to be necessary they had to be narrowly tailored to achieve the government's purpose. Thus, it was easy to assume that narrowly tailored meant that there were no-less-drastic-means available.

10. A content-based restriction is one that is directed at the content of the speech itself, while a content-neutral regulation is one that is "justified without reference to the content of the regulated speech." *Id.* at 320 (emphasis in original).

"Our cases indicate that a *content-based* restriction on *political speech* in a *public forum*, . . . must be subjected to the most exacting scrutiny. Thus we have required the State to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end.'" *Id.* at 321 (quoting *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) (emphasis in original)).

11. 109 S. Ct. 2746 (1989).

12. 109 S. Ct. 3028 (1989).

13. The Court now speaks in terms of "a fit [between purpose and means] that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Fox*, 109 S. Ct. at 3035 (quoting *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341 (1986) and *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

supplementary comment to my earlier Article addresses the outcomes of these two court decisions.

SUPREME COURT NEWSPEAK¹⁴

In *Ward v. Rock Against Racism*,¹⁵ at issue was city-operated sound amplification equipment provided to performers in Central Park to insure that New York City's concern with noise pollution was met while at the same time providing adequate amplification for the performers. The city had previously issued informal sound control guidelines designed to limit the volume of amplified music in the park.¹⁶ After multiple violations, the city considered various alternatives to enforce compliance with the guidelines. Finally, the city decided to furnish high-quality sound equipment along with an independent and experienced sound technician to operate it within regulation guidelines.¹⁷ *Rock Against Racism* then filed suit, seeking money damages and a declaration that the guidelines were facially unconstitutional.¹⁸

While the district court upheld the regulations and methods used to enforce them, the Court of Appeals for the Second Circuit reversed the lower court.¹⁹ The court of appeals found that the city's solution to the problem was not the least drastic means available. In other words, the city could have achieved its goal by means less costly in first amendment terms. The Supreme Court agreed to hear the case "to clarify the legal standard of governmental regulation of time, place, or manner of protected speech."²⁰

Upon review, the Supreme Court held that the city's narrowly tailored sound amplification guidelines were valid under the first amendment as reasonable content-neutral time, place, and manner restrictions on protected speech in a public forum.²¹ More importantly, the court espoused the rule that although a regulation of the

14. Newspeak is "Language in which the words change their meaning to accord with the official party-political views of the state." The term was coined by George Orwell (1903-1950) in his book, 1984. I. EVANS, BREWER'S DICTIONARY OF PHRASE & FABLE 754 (1970).

15. 109 S. Ct. 2746 (1989).

16. *Id.* at 2750.

17. *Id.* at 2751.

18. *Id.* at 2752. *Rock Against Racism* was warned and cited twice for violations of these guidelines. Upon the third violation, the city cut all power to the performance in progress. *Id.*

19. *Id.* at 2752-53.

20. *Id.* at 2753.

21. *Id.* at 2760.

time, place, and manner of protected speech in a public forum must be narrowly tailored to serve a legitimate content-neutral governmental interest, it need not be done by the least restrictive or least intrusive means.²²

The Supreme Court stated that “less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation.”²³ For this amazing assertion the Court basically cited three sources. The first source was Justice White’s opinion in *Regan v. Time Inc.*,²⁴ from which the above quotation was taken.²⁵

The second source for the decision was *United States v. Albertini*,²⁶ which the Court cited for the following proposition: “[O]ur cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid ‘simply because there is some imaginable alternative that might be less burdensome on speech.’ ”²⁷

The response of Justice Marshall in the *Ward* dissent²⁸ to the use of these two precedents was devastating:

My complaint is with the majority’s serious distortion of the narrowly tailoring requirement. Our cases have not, as the majority asserts, “clearly” rejected a less restrictive alternative test While there is language in a few opinions which, taken out of context, supports the majority’s position, in practice, the Court has interpreted the narrow tailoring requirement to mandate an examination of alternative methods of serving the asserted governmental interest and a determination whether the greater efficacy of the challenged regulation outweighs the greater burden it puts on protected speech.²⁹

22. *Id.* at 2757-58.

23. *Id.* at 2757 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984) (plurality opinion)).

24. 468 U.S. 641, 657 (1984) (opinion of White, J.).

25. 109 S. Ct. at 2757.

26. 472 U.S. 675 (1985).

27. 109 S. Ct. at 2757 (quoting *Albertini*, 472 U.S. at 689).

28. Justice Marshall dissented, joined by Justices Brennan and Stevens.

29. 109 S. Ct. at 2761 (Marshall, J., dissenting) (footnote omitted). Footnote 2 of the Marshall dissent reads as follows:

United States v. Albertini, for example, involved a person’s right to enter a military base, which, unlike a public park, is not a place traditionally dedicated to free expression. [472 U.S.] at 687 (commanding officer’s power to exclude civilians from a military base can not “be analyzed in the same manner as government regulation of a traditional public forum”). Nor can isolated language from Justice White’s opinion in *Regan v. Time, Inc.*, which commanded the votes of three other Justices, be construed as this Court’s definitive explication of the narrowly tailored requirement. 109 S. Ct. at 2761 n.2 (Marshall, J., dissenting) (citations omitted).

The third cited precedent was enhanced by the *Ward* Court's artful use of ellipses in a quotation from *Clark v. Community for Creative Non-Violence*:³⁰

We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands We do not believe . . . that either *United States v. O'Brien*, or the time, place, or manner decisions assign to the judiciary the authority to replace the [parks department] as the manager of the [city's] parks or endow the judiciary with competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.³¹

Among the words deleted from the quoted portion of the *Clark* opinion are these: "The Court of Appeals' suggestions that the Park Service minimize the possible injury by reducing the size, duration or frequency of demonstrations would still curtail the total allowable expression in which the demonstrators could engage, whether by sleeping or otherwise" ³²

Thus, far from a refusal to interpret narrowly tailored to include the no-less-drastic-means concept, the *Clark* Court's views on the subject can be read as saying that the court of appeals' suggested alternatives were simply *not less drastic*. In that context, the Court could not second-guess the Park Service.

In regard to commercial speech, a more recent Supreme Court decision, *Board of Trustees v. Fox*, stated, "Whatever the conflicting tenor of our prior dicta may be, we now focus upon this specific issue *for the first time*, and conclude that the reason of the matter requires something short of a least-restrictive-means standard [in the analysis of commercial speech regulations]."³³ In *Fox*, the Court considered a first amendment challenge to a rule of the State University of New York that, with certain exceptions, private commercial enterprise was not allowed access to the university's campus or facilities.³⁴ In the

30. 109 S. Ct. at 2757 (citing 468 U.S. 288 (1984)).

31. *Id.* (quoting *Clark*, 468 U.S. at 299 (citing *O'Brien*, 391 U.S. 367 (1968))).

32. 468 U.S. at 299.

33. 109 S. Ct. at 3033 (emphasis added).

34. *Id.* at 3031. The rule was applied to prohibit the plaintiff, Fox, from conducting dormitory meetings of American Future Systems, Inc. (AFS), a company that markets its houseware products to students through informal residential gatherings. *Id.* Fox and AFS brought suit for declaratory relief, maintaining that in preventing AFS demonstrations and discussions, the rule violated the first amendment. *Id.*

order being reviewed by the Supreme Court, the Court of Appeals for the Second Circuit had applied a rule of constitutional law that would have invalidated the university rule if its purposes could have been met by means that were less intrusive upon first amendment rights.³⁵ Thus, as described by the Supreme Court, “[t]his case presents the question whether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end.”³⁶

The court held that a regulation of time, place, and manner of commercial speech must be narrowly tailored to serve a substantial governmental interest, but the means employed do not have to be the least restrictive; they must simply be reasonable in relation to the stated purpose.³⁷ The dissent’s response in *Fox* is all the reply needed to refute that statement. While the majority held that “least restrictive means” analysis does not apply to commercial speech cases,³⁸ that holding could only be reached by significantly recasting contrary language in prior cases.³⁹

Thus, the Supreme Court has reinterpreted its opinions with the result that the standard of narrowly tailored no longer equates to the standard of no-less-drastic-means. What does this hold in store for the time, place, and manner and commercial speech doctrines?

CONTENT-NEUTRAL TIME, PLACE, AND MANNER REGULATIONS

The Supreme Court summarized the revision of its time, place, and manner standard as follows:

35. *Id.* at 3030-31.

36. *Id.* at 3031.

37. *Id.* at 3034-35.

38. *Id.* at 3033.

39. *Id.* at 3038 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting).

Footnote 1 of the dissent reads as follows:

The majority concedes that it must repudiate the Court’s repeated assertion that regulation of commercial speech may be “not more extensive than is necessary to serve a [substantial governmental] interest” in order to decide that “least-restrictive means” analysis does not apply to commercial-speech cases. Indeed, to reach its result, the majority must characterize as “dicta” the Court’s reference to “least-restrictive means” analysis in *Zauderer v. Office of Disciplinary Counsel*, although this reference seems integral to the Court’s holding that the ban on attorney advertising at issue there was not “necessary to the achievement of a substantial governmental interest.”

Id. (citations omitted) (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980) and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644 (1985)).

Lest any confusion on the point remain, we reaffirm today that a regulation of time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather the requirement of narrowly tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." To be sure, this standard does not mean that a time, place, or manner regulation may burden *substantially* more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a *substantial portion of the burden on speech does not serve to advance its goals. So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.*⁴⁰

This holding shifts the relation of the means selected by government to the purpose it wishes to achieve from "necessary" to "reasonable under the circumstances." While still a variety of midlevel scrutiny, it is somewhat further removed from the strictest scrutiny of the compelling government test.

Thus, the new test seems to be comparable to the test in the two legitimacy of birth cases discussed in *Three Ring Circus*,⁴¹ *Trimble v. Gordon*⁴² and *Lalli v. Lalli*.⁴³ In *Trimble*, the Court invalidated an Illinois law that refused to allow a child to inherit from his father's estate unless the father and mother had been married subsequent to the child's conception and the father acknowledged the child. The Court struck down the law because it found that the Illinois law excluded illegitimate children whose inclusion could "be recognized without jeopardizing the orderly settlement of estates or the dependability of title to property passing under intestacy laws."⁴⁴ Substituting the language of the *Ward* Court, the Illinois law was "substantially broader than necessary to meet the government's interest."⁴⁵

40. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757-58 (1989) (citations omitted) (emphasis added) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

41. Marks, *supra* note 1, at 339-40.

42. 430 U.S. 762 (1977).

43. 439 U.S. 259 (1978).

44. 430 U.S. at 772.

45. *Ward*, 109 S. Ct. at 2758. The *Ward* Court went on to point out, however, that a "regulation will not be invalid simply because a court concludes that the government's interest

On the other hand, the New York law at issue in *Lalli v. Lalli*, basing the right of the illegitimate child to inherit from the estate of his deceased father on a judicial declaration of paternity during the father's lifetime, was "a carefully considered legislative judgment."⁴⁶ In the *Ward* language the law was not "substantially broader than necessary to achieve the government's interest."⁴⁷

Thus, the content-neutral time, place, and manner test would suffer the same malady as the illegitimacy test. The existence vel non of a real and substantial relationship (substantially or not substantially broader than necessary)⁴⁸ would merely announce a result. If the law were deemed substantially broader (no real and substantial relationship)⁴⁹, the law would not pass constitutional muster. Otherwise it would.

In *Ward*, the majority found that the use of city amplification equipment and technicians was not substantially broader than necessary, even though other less drastic ways might have served the city's purposes. The dissent agreed with the court of appeals, that the law was substantially broader because the goal of the law could have been achieved in a less drastic way.

COMMERCIAL SPEECH REGULATION

The same general reasoning⁵⁰ holds true after the Court's abandonment of the no-less-drastic-means test in the context of commercial speech. These "decisions require . . . a 'fit' between the legislature's ends and the means chosen to accomplish those ends,' a fit that is not necessarily perfect but, *reasonable*; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interests served.'"⁵¹

The law struck down in *Trimble v. Gordon*⁵² was unreasonable because the means had no real and substantial relationship to the

could be adequately served by some less . . . restrictive alternative." *Id.*

46. 439 U.S. at 267, 274.

47. *Ward*, 109 S. Ct. at 2758. See *supra* note 45.

48. *Id.* at 2757-58.

49. *Id.*

50. See *Lalli v. Lalli*, 439 U.S. 259, 267 (1978); *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757-58 (1989).

51. *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3035 (1989) (emphasis added) (quoting *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341 (1986) and *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

52. 430 U.S. 762 (1977).

purpose.⁵³ Substituting the Court's new commercial speech language, the law would have been called unreasonable because it was not "in proportion to the interest served."⁵⁴ On the other hand in *Lalli v. Lalli*,⁵⁵ the means had a real and substantial relationship because while "not necessarily [representing] the single best disposition,"⁵⁶ it was "reasonable" and "in proportion to the interest served."⁵⁷

CONCLUSION

The Court has abandoned the no-less-drastic-means requirement in content-neutral time, place, and manner and commercial speech regulation. In its place, the Court has substituted a "reasonable fit" test, which is not different from the imprecise standard of the real and substantial relationship test. "This particular 'intermediate scrutiny' frequently fails to explain the outcome. To that extent, the existence *vel non* of a real and substantial relationship of means to . . . purpose merely announces a result; real and substantial relationship of means equates to constitutionality while a lack thereof equals unconstitutionality."⁵⁸

53. See Marks, *supra* note 1, at 338 n.251.

54. *Fox*, 109 S. Ct. at 3035 (quoting *In re R.M.J.*, 455 U.S. at 203).

55. 439 U.S. 259 (1978).

56. *Fox*, 109 S. Ct. at 3035.

57. *Id.* (quoting *In re R.M.J.*, 455 U.S. at 203).

58. See Marks, *supra* note 1, at 339.

